IN THE HUSTINGS COURT OF PETERSBURG, VA.

CHARLES LEONARD *v.* STANDARD DISTILLING CO., AND OTHERS.

Landlord and Tenant—Duration of Tenancy—Holding Over—Priority of Liens.—A tenancy from month to month, created by the tenant holding over after the expiration of his original term, is a new term for each month of such holding over. Accordingly liens of execution creditors not created until after the commencement of the lease nevertheless take priority over distress liens of the landlord, though at the time of their creation no default had been made in the payment of rent, and not until several months thereafter.

STATEMENT OF CASE.

This is a controversy, submitted without action to the Judge of the Hustings Court of Petersburg, Virginia, for determination, that has arisen between the landlord and certain creditors of J. A. Wesson over the proceeds of the personal effects of said tenant found on the leased premises, sold by the High Constable under warrant of distress and by the Sergeant under Executions.

In November, 1903, Wesson leased of Charles Leonard, the letting being by parole, a certain store in the City of Petersburg, by the month, at a monthly rental of $25.00. These premises were thereafter continuously occupied as a retail liquor store by said Wesson and one S. A. Lawrence as partners under the style of Wesson and Lawrence, until some time in 1908, when Wesson bought out Lawrence and continued the business in his own name until August, 1910 when he was evicted for the non-payment of rent.

On November 15th, 1908, the rent was raised to $40.00 per month, which Wesson paid monthly for about a year. In March, 1910, when he was in arrears for between three and four months of rent, Leonard sued out a distress warrant for $145.50, amount of rent due to March 15th, 1910, upon which $41.00 was paid, and no further proceedings were had thereunder.

In May, 1910, a second distress warrant was issued for $184.50, amount of rent due May 15th, 1910, under which the High Constable levied upon and sold certain of the personal effects of the said Wesson found on the leased premises and used by him in his said business, realizing therefrom $192.67 net.

In June 1910, and after said sale, Leonard issued a third distress warrant for $47.93, being one month's rent ($40.00) to June 15th, 1910, and $7.93 water rent, and placed it in the hands of the High Constable who levied the same upon other personal effects of said Wesson found on the leased premises. Shortly

thereafter proceedings were taken to dispossess Wesson for non-payment of rent, under which he was evicted August 5th, 1910.

Prior to the suing out and levying of these distress warrants, two judgments were obtained against Wesson and Lawrence and docketed in the Clerk's office of the Hustings Court. Executions were issued thereon and levied by the Sergeant upon the personal effects of Wesson found on the leased premises, and due returns made by him upon said executions showing the property levied on. The first execution, in favor of the Standard Distilling Company for $139.49, was levied June 26th, 1909; and the second, in favor of Rasin, Craig and O'Connor for $246.20, on September 13th, 1909.

On August 16th, 1910, the Sergeant by virtue of the levies made by him as aforesaid, sold the remainder of the personal effects of Wesson embraced in said levies and not sold by the High Constable, realizing therefrom $82.50 gross. All of the property sold by the High Constable was embraced in said levies.

THE LAW OF THE CASE.

The above statement shows that the liens of the execution creditors were not created until after the commencement of Wesson's lease; and that, at the time of their creation, no default had been made in the payment of rent, and not until several months thereafter. If, therefore, Wesson's tenancy was a continuing one, and not a new tenancy at the beginning of each month, then, under Section 2791 of the Code, the distress liens of the landlord have priority. If, however, each month must be considered a new letting and entry thereunder, then the liens of the execution creditors take precedence. City of Richmond *v.* Duesberry, 27 Gratt. 210; Wades *v.* Figgatt, 75 Va. 575; Upper Appomattox Company *v.* Hamilton, 83 Va. 319.

The nature of Wesson's tenancy cannot be questioned. It was a tenancy from month to month, either in its inception, or it became so after the expiration of the first month and the holding over by the tenant and acceptance of payment for the rent by the landlord. [24th Cyc. 1034, 1036; Williams *v.* Hall Company, 80 Conn. 503.] Such tenancies are recognized notwithstanding the statute of frauds, and the general principles governing them are well settled. They are the creatures of judicial decisions, based upon principles of policy and justice. In order to obviate the many inconveniences of the old tenancies at will, the courts raised an implied lease for a certain period, and which renews itself for a like period unless due notice of the purpose to surrender or for possession is given.

The right of the landlord to demand rent and of the tenant

to hold over after the termination of the original lease having been acquired, is certain for the current period and renews itself for a like period ad infinitum unless the right is terminated by giving the notice prescribed by law, in this state by statute—Code Sect. 2785. It is a periodical tenancy. Is it a continuous one for the several periods of its existence, or a re-letting by operation of law upon the expiration of each period? As to this the decisions are not in accord.

In the City of Richmond *v.* Duesberry, 27 Gratt. 210, there was a lease for one year, beginning January 1st and ending December 31st, 1871. The tenant held over, and it was held that the holding over was under a new lease—a tenancy from year to year being thereby created by operation of law. It is manifest that the holding over for 1872 was a separate and distinct letting arising by implication. To create it, the holding over had to be ratified by the landlord, either by his acceptance of rent or other acquiescence. It was the beginning of a demise from year to year, whereas, the original lease was for a specific period. My first impression was that the succeeding years of possession under such a demise was but a continuation of the first, and that they should be considered as one tenancy. The weight of authority, however, is to the contrary.

While the English decisions are in conflict, those of the United States, especially the more recent decisions, hold, with one or two exceptions, that a tenancy created by the tenant holding over after the expiration of his original term, is a new term for each period of such holding over, upon the terms of the original lease so far as they are applicable to the new relations. Kennedy *v.* City of New York, 196 N. Y. 19; 89 N. E. 360, decided October 5, 1909; Williams *v.* Hall Co., 80 Conn. 503, 60 Atl. 12, decided March 5, 1908; Donk *v.* Leavitt, 109 Ill. App. 385, decided in 1903; Gladwell *v.* Holcomb, 60 Ohio St. 427, decided in 1899; Stewart *v.* Apel, 5 Houst. [Del.] 189; Parrott *v.* Barney, 18 Fed. Cas.; Griffeth *v.* Lewis, 17 Mo. App. 605 and others; and Wood's Landlord & Tenant Secs. 22 and 53; 2 Wood on Nuisances [3rd Ed.], p. 1222; and Shearman and Redfield on Negligence, 5th Ed. Sec. 708.

In Gladwell *v.* Holcomb, supra, in which is cited Alexander *v.* Harris, 4 Cranch 299, and Railroad *v.* West, 57 Ohio St. 161, it was held that where the tenant holds over after the expiration of a lease for a specified term, a new contract not only arises each year of the holding over, by implication from the conduct of the parties, but the court says "it is not readily seen how otherwise such a tenancy could escape the statute of fraud;" and this objection is intimated in Railroad *v.* West, supra, as showing the implied contract for another term arising

from the tenant holding over does not fall within the statute of frauds, it is said "The tenant by holding over is regarded as consenting or proposing to enter upon a new term for another year at the same rent and upon the conditions of the prior occupancy, and the landlord's acceptance of the proposed tenancy is presumed from his receiving the rent, or other acquiescence. * * * The new agreement grows out of, and is founded upon, the possession evidenced by the holding over, and is therefore referable to it, rather than to the possession under the prior agreement which had expired." By remaining in possession without any new agreement, the tenant is regarded as offering to take the premises for another year upon the terms of his tenancy which has just expired. The holding over after the end of any year is equivalent to holding over after the expiration of a lease for a specific term. Gladwell *v.* Holcomb, supra.

In Stewart *v.* Apel, 5 Houst. [Del.] 189, premises were let for five years by agreement in writing, but as it was not under seal, the lease by statute was good only for one year. The tenant continued in possession for the whole five years. It was held that each year constituted a distinct demise, with the extension and re-extension of all the stipulations expressed in the written agreement.

In Kennedy *v.* New York, supra, the Court says: "The only logical deduction from the choice given the landlord of treating a hold-over tenant as a tenant for another year is that each holding over, when acquiesced in by the landlord, constitutes a new term, separate and distinct from those which preceded it, and related to each other only in the conditions of the original lease which the law reads into the new tenancy. Some of the text writers and a few of the earlier decisions seem to have confused the subject by referring to tenancies from year to year, arising by operation of law, as continuations of the original term, when it would have been more correct to characterize them as new tenancies, subject to the original conditions."

Such tenancies cannot be denominated as indefinite leases, for the reason it is essential to the validity of a lease that it prescribe with reasonable certainty the date of commencement and duration of the term. 24 Cyc. 902. They must embrace terms for a fixed number of weeks or months, or for a single year, or for a definite number of years. Id. 958. Nor can it be a lease for more than a year unless the agreement therefor is in writing. Code Sec. 2840.

Where the principle of continuance is introduced into the original contract, and is not obnoxious to the statute of frauds or for indefiniteness, the rule is different. Alexander *v.* Harris, 4 Cranch 299; Gladwell *v.* Holcomb, supra. Because there was

no provision for such renewal in the original lease, an agreement for extension entered into before the expiration of the term under the original lease was treated as creating a new tenancy. Upper Appomattox Co. *v.* Hamilton, 83 Va. 319.

Against this array of authorities holding that each recurring period of these periodical tenancies constitutes a new term, separate and distinct from those preceding it, I am able to find but two cases in this country holding the reverse, both of which are from the State of Washington, namely, Glass *v.* Coleman, 14 Wash. 635, 45 Pac. 310, and Ward *v.* Hinckleman, 37 Wash. 375, 79 Pac. 956. In this last case, which presents the point more clearly, it was held that, where there was a letting from month to month, the landlord was not liable to one injured by a defect in the premises which did not exist when the tenant took possession, but did exist before the last monthly period began. "The legal fiction" says the court, "that there is a re-entry and a re-letting at the beginning of every month is too refined to meet our approval. It is true, our statute declares, that when premises are rented for an indefinite time, with monthly rent reserved, the tenancy shall be construed to be a tenancy from month to month. But the statute further provides that the tenancy shall continue until terminated by a notice and unless so terminated, the tenancy is a continuing one." There is no such statute in this state, for Sec. 2785 of the Code simply has the effect of modifying in some particulars the rule as to the length of notice to be given fixed by judicial construction. It may be, therefore, that the peculiar wording of the Washington statute justifies the conclusion of the court. If it expressly states, as intimated by the court in Ward *v.* Hinckleman, that such a tenancy shall continue until terminated by notice, and without notice is a continuing one, it at least gives plausibility to the ruling. It cites only one authority, 18 Am. & Eng. Enc. of Law, 2 Ed., p. 244, in support of its finding; and the text of this authority cites only two English and one Canadian case and Glass *v.* Coleman, supra, to sustain it. Again, in 24 Cyc. 1034, it is declared that such a tenancy is a continuing one and not a new tenancy at the beginning of each month, but Ward *v.* Hinckleman is the only authority it cites. But in notes 99 and 1 on p. 1028 of this same volume (24) several English authorities and Parrott *v.* Barney, 18 Fed. Cas. are cited to the effect that a tenancy from year to year is not continuous but recommencing every year.

My conclusion, therefore, is that upon principle and authority, a tenancy from month to month, created by the tenant holding over after the expiration of his original term, is a new term for each month of such holding over; and that the liens of the execution creditors, the Standard Distilling Company and Rasin,

Craig and O'Connor, are prior to that of the landlord's, Charles Leonard, and should be paid first out of the proceeds arising from the sale of the personal effects, whether sold by the High Constable or Sergeant. As between this execution creditors, the Standard Distilling Company has priority.

J. M. MULLEN,

Sept. 17, 1910. JUDGE.

Note.

Implied Tenancy from Holding Over.—The rule laid down in New York at an early date and sustained by the great weight of authority in the United States is that if a tenant for a year or term of years holds over after the expiration of his term by efflux of time, or if a periodical tenant holds over after the termination of his tenancy by notice to quit, the landlord may at his option, and against the will or intention of the tenant, hold the tenant liable as for a renewal of the lease for another year, or, if the expired term was for less than a year, for another similar term. 18 Am. & Eng. Enc. of Law (2nd Ed.), p. 405.

In other words, the law presumes the holding to be upon the terms of the original lease so far as they are applicable to the new situation. Peirce *v.* Grice, 92 Va. 763, 24 S. E. 392; King *v.* Wilson, 98 Va. 259, 35 S. E. 727; Baltimore Dental Ass'n *v.*, Fuller, 101 Va. 627, 44 S. E. 771; Richmond *v.* Duesberry, 27 Gratt. 210, 214; Voss *v.* King, 38 W. Va. 607, 18 S. E. 762.

And this implied tenancy from holding over arises where the lessor receives rent accruing subsequently to the expiration of the term, or does any act, from which it may be inferred that he intends to recognize him still as tenant. Allen *v.* Bartlett, 20 W. Va. 46; Emerick *v.* Tavener, 9 Gratt. 220, 58 Am. Dec. 217; Williamson *v.* Paxton, 18 Gratt. 475; Holden *v.* Boring, 32 W. Va. 37, 43 S. E. 86.

But it was held by the supreme court of appeals of West Virginia in Kaufman *v.* Mastin, 66 S. E. 92, that a tenant's holding over and paying monthly rent beyond the term of a lease for a year, relating to urban premises, in which lease rent is reserved by the month and is payable at monthly periods, does not, alone, imply a renewal by the year. A renewal of the tenancy by the month is thereby implied, and hence 30 days notice to quit would be sufficient under the Virginia statute. The court said obiter, however, that: "Of course, if the lease is originally for a year, or term of years, and the rent is reserved as a yearly rent, even though payable in installments, a holding over and acquiescence therein of the landlord implies a renewal by the year."

The fact that the holding over by the tenant is accidental or involuntary, and not intentional or wilful, will not relieve him from liability for a second year. Mason *v.* Wierengo, 113 Mich. 151; Frost *v.* Akron Iron Co. (N. Y. Super. Ct. Gen. T.), 12 Misc. (N. Y.) 348. Compare Manly *v.* Clemens (N. Y. City Ct. Gen. T.), 39 N. Y. St. Rep. 199.

Difficulty and inconvenience in engaging trucks is no excuse. Haynes *v.* Aldrich, 133 N. Y. 287, 28 Am. St. Rep. 636.

Mistake of Tenant as to Time When His Lease Terminated.—Wood *v.* Gordon (C. Pl. Gen. T.), 18 N. Y. Supp. 109.

Effect of Illness.—It has been held that if the tenant is prevented from removing on account of the serious illness of a member of his

family, whose life would be endangered by removal, he cannot be considered as holding over so as to subject him to the liability for a second year merely because he left such member of his family in a room of the demised building, having vacated the other portions of the building. Herter *v.* Mullen, 159 N. Y. 28, reversing 9 N. Y. App. Div. 593. Compare Haynes *v.* Aldrich, 133 N. Y. 287, 28 Am. St. Rep. 636. See, also, to the same effect, Regan *v.* Fosdick (Supm. Ct. App. T.), 19 Misc. (N. Y.) 489, where the removal was forbidden by the board of health.

When the tenant has been prevented from moving on account of illness in his family, he should, when able to move, give notice to his landlord, and his liability for rent does not cease prior to such notice. Herter *v.* Mullen, 52 N. Y. App. Div. 325.

In Michigan, however, it was held in Mason *v.* Wierengo, 113 Mich. 151, that though the holding over by the lessee of a building used as a store was caused by his sickness, the holding over consisting of his having property on the premises, which was being removed by his clerks, it did not prevent the lessee from being held for a second year.

But if the failure to vacate is caused by the wrongful act of the landlord, the tenant will not be subjected to the consequences of a holding over. Campau *v.* Mitchell, 103 Mich. 617; Smith *v.* Allt (C. Pl. Gen. T.), 4 Abb. N. Cas. (N. Y.) 205; Schloss *v.* Huber (Supm. Ct. App. T.), 21 Misc. (N. Y.) 28; Adler *v.* Mendelson, 74 Wis. 464.

To constitute a holding over so as to impose liability on the tenant for a second period, it is not necessary that the tenant remain in the actual personal possession of the premises. Leaving his property upon the premises may constitute a holding over. Armstrong *v.* Bach, 20 La. Ann. 190; Vosburgh *v.* Corn, 23 N. Y. App. Div. 147; Lubetkin *v.* Henry Elias Brewing Co. (N. Y. City Dist. Ct.), 21 Abb. N. Cas. (N. Y.) 304.

But merely leaving a small quantity of his property upon the premises without any intention of retaining or enjoying the possession has been held not to constitute a holding over. Thomas *v.* Frost, 29 Mich. 336; Manly *v.* Clemens (N. Y. City Ct. Gen. T.), 39 N. Y. St. Rep. 199; Smith *v.* Maxfield (C. Pl. Gen. T.), 9 Misc. (N. Y.)42; Frost *v.* Akron Iron Co., 1 N. Y. App. Div. 449; Lore *v.* Pierson, 10 Daly (N. Y.) 272. See, also, Excelsior Steam Power Co. *v.* Halsted, 5 N. Y. App. Div. 124; Hammond *v.* Eckhardt, 16 Daly (N. Y.) 113.

And the same has been held true with regard to the leaving behind of rubbish. Wilson *v.* Prescott, 62 Me. 115; Gibbons *v.* Dayton, 4 Hun (N. Y.) 451; Rorbach *v.* Crossett (Supm. Ct. Gen. T.), 46 N. Y. St. Rep. 426. See, also, McCabe *v.* Evers (N. Y. City Ct. Gen. T.), 9 N. Y. Supp. 541.

A lessee cannot be charged with holding over merely because he allows certain chattels to remain on the premises after the expiration of the term, for the convenience of the incoming tenant. Lore *v.* Pierson, 10 Daly (N. Y.) 272.

The length of time during which the tenant holds over is immaterial as regards his liability for a second year. Oussani *v.* Thompson (Supm. Ct. App. T.), 19 Misc. (N. Y.) 524; Shanahan *v.* Shanahan, 55 N. Y. Super. Ct. 339. In the case first cited the tenant was held for a second year when he held over until five o'clock of the day after his term expired.

Re-Entry after Surrender of Possession.—Where the lessee surrenders the possession on the termination of the lease, his subsequent re-entry into possession cannot be considered as a holding over so

as to subject him to liability for a second year. Frost *v.* Akron Iron Co., 1 N. Y. App. Div. 449. See, also, Thomas *v.* Frost, 29 Mich. 336; Excelsior Steam Power Co. *v.* Halsted, 5 N. Y. App. Div. 124.

English Rule.—The English rule is more lenient to an overholding tenant, and does not permit him to be held for a second term without his assent, express or implied. Ibbs *v.* Richardson, 9 Ad. & El. 849, 36 E. C. L. 301; Jones *v.* Shears, 4 Ad. & El. 832, 31 E. C. L. 198; Gray *v.* Bompas, 11 C. B. N. S. 520, 103 E. C. L. 520; Waring *v.* King, 8 M. & W. 571. See, also, Alford *v.* Vickery, C. & M. 280, 41 E. C. L. 156. Compare Bishop *v.* Howard, 2 B. & C. 100, 9 E. C. L. 41.

And this rule has been followed in some of the American jurisdictions. Skaggs *v.* Elkus, 45 Cal. 154; Mendel *v.* Hall, 13 Bush (Ky.) 232; Marmiche *v.* Roumieu, 11 La. Ann. 477; Kendall *v.* Moore, 30 Me. 327; Delano *v.* Montague, 4 Cush. (Mass.) 42; Edwards *v.* Hale, 9 Allen (Mass.) 462; Emmons *v.* Scudder, 115 Mass. 367; Neumeister *v.* Palmer, 8 Mo. App. 491. Compare Constant *v.* Abell, 36 Mo. 174; Doyle *v.* O'Neil, 7 Mo. App. 138; Vegely *v.* Robinson, 20 Mo. App. 199; Green *v.* Kroeger, 67 Mo. App. 621; Delaney *v.* Flanagan, 41 Mo. App. 651.

Holding Over with Consent of Landlord.—Of course, if a tenant holds over for some particular time or purpose by permission of the landlord, he will be liable—unless he exceeds his permission—only for the period occupied. And, as heretofore stated, a tenancy at will or periodical tenancy may arise when the tenant holds over with the permission of the lessor. 18 Am. & Eng. Enc. of Law (2nd Ed.), p. 407.

Provisions in Lease Fixing Liability of Overholding Tenant.—Provisions in the lease expressly fixing the liability of the tenant in case he holds over will deprive the lessor of any right inconsistent therewith to hold the tenant for a second year. Pickett *v.* Bartlett, 107 N. Y. 277, affirming 13 Daly (N. Y.) 229. See, also, Hatty *v.* Harris, 120 N. Car. 408; Green *v.* Kroeger, 67 Mo. App. 621.

Surrender.—The landlord may accept a surrender from an overholding tenant and thus relieve the latter from further liability for rent. Rosenberg *v.* Lustgarten (C. Pl. Gen. T.), 16 N. Y. Supp. 523; Minneapolis Co-Operative Co. *v.* Williamson, 51 Minn. 53, 38 Am. St. Rep. 473.

Terms of New Tenancy.—In the absence of any express stipulations, the new tenancy created by a tenant's holding over after the expiration of his lease is implied by the law to be upon the same terms and subject to all the covenants contained in the expired lease. Of course the parties may, by express agreement, change the terms of the old tenancy; but a modification in some of the terms of the expired lease, as in case of a reduction or increase of rent, leaves the new tenancy subject to the other provisions of the lease. 18 Am. & Eng. Enc. of Law (2nd Ed.), p. 407.

Notice by Landlord of New Conditions.—If, before the termination of the lease, the tenant is notified by his landlord that if he holds over he will be required to pay additional rent or will be required to hold upon different terms from those of the expiring lease, the tenant will be bound by the terms of the notification; and this is true though at the time the tenant objects to the new conditions. 18 Am. & Eng. Enc. of Law (2nd Ed.), p. 408.

Rebuttal of Presumption.—But this presumption that a tenant who holds over after the expiration of his term, by permission of the lessor, is a tenant from year to year, may be repelled by evidence which shows that the holding over, though by permission of the

lessor, is not as tenant from year to year, but in some other character or for some other purpose. Williamson *v.* Paxton, 18 Gratt. 475.

Right of Landlord to Elect.—It is important to observe, however, that the landlord may elect to regard the tenant for years, who holds over after the expiration of his term, without paying rent, or otherwise acknowledging a continuance of the tenancy, as either a trespasser or a tenant. But the tenant has no such election; his mere continuance in possession fixes him as tenant for another year, if the landlord thinks proper to insist upon it. Voss *v.* King, 38 W. Va. 607, 18 S. E. 762.